The opinion of the Appellate Division, Third Department, of the Supreme Court of the State of New York is reported at 13 App. Div. 2d 591, 212 N. Y. Supp. 2d 884, and is set forth in the appendix, at page 7a.

The report and findings of the Subcommittee on Grievances of the Department of Education of the State of New York is unreported officially and is set forth herein in the appendix at page 16a.

The report of the Committee on Grievances of the Department of Education of the State of New York is unreported officially and is set forth herein in the appendix at page 13a.

The report of the Regents' Committee on Discipline of the Department of Education of the State of New York is unreported officially and is set forth in the appendix at page 10a.

The vote of the Regents is set forth in the appendix at page 9a.

## Jurisdiction

The judgment of the Court of Appeals of the State of New York was dated and entered April 5, 1962, and the order of the Appellate Division, Third Department, of the Supreme Court of the State of New York, adopting the said judgment of the Court of Appeals, was entered May 16, 1962.

Jurisdiction of this Court to review the above mentioned judgment and order by writ of certiorari is based on 28 U. S. C. 1257 (3).

The request is made that a writ of certiorari issue to the said Appellate Division, Third Department, of the Supreme Court of the State of New York instead of to the Court of Appeals of the State of New York for the reason that the record herein was remitted by the Court of Appeals to the said Appellate Division, which said Appellate Division now has possession of the record herein.

## Questions Presented

1. Was the Constitution of the United States, Amendment 14, violated and petitioner deprived of due process and denied equal protection of the law, by reason of the following:

(a) That his license to practice medicine was revoked on provisions of New York State Education Law, § 6515, and Sec. 211 which petitioner contends are invalid by reason of the fact that they are repugnant to the Constitution of the United States, in that a procedure is authorized which deprives a citizen, a holder of a medical license, of due process of law and a fair hearing.

(b) In that said sections authorize an administrative body to hold hearings, to decide charges against a doctor and revoke his license or otherwise penalize him, unrestrained by any standard of legal requirement, thus constituting conjecture, inference and hearsay as a valid basis for sustaining charges of conspiracy and fraud in the practice of medicine.

(c) Section 6515 authorizes accusers who are without any legal training, to set up their own forum and rules of procedure and pass upon the validity and admissibility of evidence, contrary to basic rules of pleading and practice.

(d) Section 6515 authorizes an industry body of private citizens, unfamiliar with the weight, sufficiency and admissibility of evidence to perform a legal, judicial and public function for which they were untrained and legally incompetent.

(e) Section 6515 authorizes a lay industry body of doctors to render judgment constituting a finding of "conspiracy and fraud in the practice of medicine" without hearing any of the evidence and without opportunity of legal representation on behalf of the doctor, as to the legal

import of the alleged evidence adduced and without any indication that the record was actually read by the administrators who made the final decision.

(f) Section 6515 grants to an administrative lay industry body unlimited power to disbar a doctor from practicing medicine, without any standard, statute or legal limitations, thus allowing vague, indefinite, unsupported charges, based on hearsay, to be accepted as legally sufficient to deprive a doctor of his license to practice medicine.

(g) Section 6515 authorizes a lay industry body, sitting in a forum of their own choosing, both as the accusers as well as the judges, to invoke statutes, retroactively, as a legal basis for revoking petitioner's license to practice medicine, based on acts never theretofore so classified by any court or medical association.

## Laws Involved

1. Section 1 of Amendment 14 to the United States Constitution (appendix 22a).

2. New York State Education Law, Section 211 (Appendix 22a).

3. New York State Education Law, Section 6501 4 (Appendix 23a).

(4) New York State Education Law, Section 6514 2(a) (appendix 24a).

(5) New York State Education Law, Section 6514 2(g) (appendix 24a).

(6) New York State Education Law, Section 6515 (appendix 24a).

## Statement

Petitioner's license to practice medicine was revoked on the finding by the subcommittee of the Board of Regents of the State of New York that petitioner had signed exaggerated bills and reports prepared by a lawyer, I. Frank Miller, since convicted of forgery (R. 193).

Petitioner's credibility was erroneously and improperly discredited by the improper introduction of a typewritten document offered as a false exhibit (Exh. D, R. 154) to prove that petitioner had falsified his testimony when he stated he did not have secretarial services.

The retraction was made by the Board of Regents after petitioner had been seriously prejudiced.

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February 10, 1961

Hon. Francis Bergan
Presiding Justice
Appellate Division, Third Department
Albany, New York

Re: Wassermann v. The Board of Regents.
January Term, 1961, No. 2945

Dear Judge Bergan:

I have learned today that Exhibit D handed up at the time of oral argument in the above-entitled proceeding is not the exhibit introduced by petitioner at the original hearing of this matter but is a typewritten copy as prepared by the hearing stenographer who lost the original exhibit after it had been read into the minutes (fols. 462-464). I am advised that the stenographer himself typed up the copy which he marked Exhibit D in evidence.

When the matter was assigned to me at this office, I found Exhibit D in the form as handed up to the Court. Part of my advocacy on behalf of the respondent in our brief was based upon the fact that Exhibit D was typed rather than handwritten. In all fairness to petitioner and to the Court, I respectfully request that references on pages 8 and 10 of our brief to Exhibit D as a typewritten document be disregarded. I wish to urge here that Exhibit D at the time of the original hearing was, in fact, handwritten by petitioner.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General
By ROBERT W. BUSH
ROBERT W. BUSH
Assistant Attorney General

cc Hon. William H. Coon
Hon. James Gibson
Hon. J. Clarence Herlihy
Hon. Walter B. Reynolds
Angelo A. Tumminelli, Esq.
BUSH:jnl

On October 31, 1960, petitioner's license to practice medicine in the State of New York was revoked by the respondent after a hearing was held by a Subcommittee of the Grievance Committee of the Board of Regents of the Department of Education of the State of New York, on charges preferred by an employee of the said Department of Education (R. 206).

The hearing was held on charges that petitioner was guilty of fraud or deceit in the practice of medicine in violation of Education Law, Section 6514 2(a), and petitioner was also charged with conspiracy in violation of Education Law, Section 6514 2(g) (R. 44).

Under 2(a), petitioner was charged with "submitting" false bills and reports to an attorney relating to medical services performed for the said attorney's clients (First specification of the charges) (R. 44).

Under 2(g), petitioner was charged with entering into an illegal conspiracy with said attorney wherein the petitioner would allegedly "furnish" the said attorney with false, fraudulent and exaggerated medical bills and medical reports for the said attorney's clients (Second specification of the charges) (R. 48).

The Subcommittee of the Grievance Committee, which held the hearing, found that petitioner was guilty of "issuing" false medical bills and reports and that he was guilty of fraud or deceit in the practice of medicine under said subdivision 2(a) and guilty of entering into an illegal conspiracy with the said attorney and was therefore guilty of unprofessional conduct in the practice of medicine under subdivision 2(g) (R. 189).

The Subcommittee thereupon recommended that:

> "In view of the gravity of the charges against the respondent and the proof adduced in support thereof, we feel that the respondent is not fit to be entrusted with the responsibilities, duties and obligations of a practicing physician to the public" (R. 194).

The nine member Grievance Committee thereupon recommended revocation of practitioner's license in its report dated May 5, 1960 (R. 196).

Thereafter, on September 13, 1960, the report of the Regents' Committee on Discipline recommended the revocation of petitioner's license, as a result of which the Regents' Committee, on September 30, 1960, voted to comply with the recommendation of revocation (R. 203, f. 609).

On October 31, 1960, an order was made revoking practitioner's license to practice medicine in the State of New York (R. 206).

On November 15, 1960, an order to show cause was made by a Justice of the Supreme Court for the Appellate Division, Third Department, staying the order of revocation of petitioner's license and bringing on to be heard before the said court a petition for judicial review of respondent's proceedings, pursuant to the provisions of Article 78 of the Civil Practice Act of the State of New York (R. 3-19).

On this review, the said Appellate Division confirmed respondent's order of revocation in its order entered July 10, 1961 (opinion herein, appendix, p. 7a) (R. 214-216).

The said Appellate Division thereafter denied leave to appeal to the Court of Appeals.

Leave to appeal to the Court of Appeals was thereafter granted by the Court of Appeals in its order dated January 18, 1962, which order also stayed respondent's order of revocation, pending the final determination of the said appeal (R. 220-221).

The Court of Appeals thereafter affirmed the Appellate Division in its order dated and entered April 5, 1962, which order remitted the record herein to the said Appellate Division (48a).

On May 16, 1962, the said Appellate Division entered its order adopting the judgment of the Court of Appeals as its own order (58a).

The record herein now being in the possession of the said Appellate Division, petitioner thereupon instituted this petition for writ of certiorari to the said Appellate Division to review the judgment and order of the Court of Appeals of the State of New York.

The Federal question as to denial of petitioner's constitutional rights was first raised in petitioner's petition to the Appellate Division (R., 15, fol. 44, et seq.). The Court failed to pass upon the constitutional questions raised, except indirectly by confirming respondent's order of revocation (see opinion, R. pp. 217-219, appendix, p. 7a).

The Federal question of unconstitutionality was thereafter again raised by petitioner in his motion to the Court of Appeals for leave to appeal thereto (see motion for leave to appeal to the Court of Appeals) p. 8 subpars. (a) and (d) (appendix, pp. 35a-36a); p. 9, subpar. III, subpar. 6 (appendix, pp. 36a-37a); p. 10, subpar. 7 (appendix, p. 37a); p. 19, paragraph in midpage (appendix, p. 41a); p. 20, last paragraph thereof (appendix, p. 41a); p. 22, headnote thereon (appendix, p. 42a); p. 23, first paragraph thereof (appendix, p. 42a); p. 24, Point I, Headnote (appendix, p. 43a); p. 27, Point II, Headnote (appendix, p. 43a); p. 28, next to last paragraph (appendix, p. 43a); p. 29, last paragraph (appendix, p. 43a); p. 30, last paragraph (appendix, p. 43a); p. 34, bottom of paragraph (appendix, p. 44a); p. 35, bottom of page (appendix, p. 44a); p. 39, paragraph preceding Point V (appendix, p. 44a).

The Court of Appeals granted the said motion for leave to appeal to it on the aforesaid questions raised (R. 220).

The Federal questions were then presented in the Court of Appeals as follows: Petitioner's brief, Points II, III and IV, pp. 26-28 (appendix, pp. 45a-47a).

The Court of Appeals, in its opinion (appendix, p. 1a), failed to comment on the constitutional questions raised by petitioner and apparently disposed of the Federal questions with the following statement:

> "We have considered carefully the other issues raised by appellants and find them to be without merit." (6a)

## Reasons for Granting the Writ

The Court of Appeals of the State of New York has decided federal questions of substance not heretofore decided by this Court, and has decided them in a way not in accordance with the applicable decisions of this Court.

Moreover, the respondent has pending, before it, proceedings of like nature against approximately 1500 doctors, similarly accused of "unprofessional conduct", etc., who will be subjected to the same type of hearing under the same provisions of statute as are the subject of review herein, *i.e.*, Education Law, Sections 6514 and 6515 (see appendix, pp. 24a-25a).

Obviously, therefore, it is of far greater importance that respondent's procedures, and the authorizing statutes, be reviewed for constitutional defects and violations when the licenses of 1500 doctors are involved in the adjudication thereof than if petitioner alone were so involved.

As is demonstrated by the glaring headlines of the newspaper articles set out in the appendix, following 60a, petitioner was one of the first of the doctors to be proceeded against in a wave of public passion and hysteria, resulting in a mass "witch hunt", with all the attendant lack of due process usually found in such an atmosphere.

## Summary of the Argument

Subdivisions 2(a) and 2(g) of Education Law Section 6514, being penal and punitive statutes promulgated in the exercise of the police power, do not define what acts constitute violations of their provisions, do not adyise or inform those whose conduct is to be controlled what acts are prohibited, and the said subdivisions are constitutionally defective for failure to contain definite standards and for delegation to the administrative agency charged with their enforcement of an unfettered and unbridled discretion to legislate the standards of conduct.

Section 6515 of the Education Law is unconstitutionally defective in that it provides for delegation of a public function (that of holding hearings as a judicial or quasi-judicial body, making findings of fact, deciding questions of law, admitting and/or rejecting evidence, evaluating the credibility of witnesses and weighing the evidence) to a private industry body of unpaid doctors not trained or competent to perform the said judicial functions, and the said Section 6515 permits the revocation of licenses to practice medicine by such an incompetent tribunal on hearsay evidence without requiring any quantum of probative evidence to support the revocation.

Due process, therefore, is lacking, not only in what *was* done herein under the statute, but in what *may* be done under the statute.

Petitioner was denied the equal protection of the laws in that the courts of the State of New York denied him a remedy which was available to him and in that he received a far more severe penalty than was meted out to others found guilty of violating the same provisions, even to the extent that the other said violations were of a far more serious nature.

Petitioner was denied due process in that he was found guilty without probative evidence of any quantity to sup-

port the finding; the presentation of hearsay comments and its reception by the hearing committee as evidence prevented him from confronting witnesses against him and deprived him of the opportunity of cross-examination.

The respondent utilized and submitted a false typed exhibit to the Appellate Division, arguing that it destroyed petitioner's credibility and contention that he had no secretarial services available, thereby deceiving the Court and resulting in denial of due process to petitioner. An explanatory letter was later submitted to the Appellate Division, *after* the matter was heard and argued. The explanation established that the original exhibit was, in fact, a handwritten document which had been lost by the hearing stenographer, who thereupon typed up a copy from the hearing minutes. The probability is great that it was this false typed exhibit which was considered by the hearing sub-committee and the 9 man grievance committee when it studied the evidence and arrived at its determination. The probability is also great that any subsequent review by the Regents' Committee on Discipline and the Regents Committee itself had only this false typed exhibit rather than the original handwritten document.

The reviews, therefore, at the various administrative levels were based in part on this false evidence, no explanation or admission of which was made until *after* the matter was heard by the Appellate Division.

Petitioner was deprived of due process in that the decision to revoke petitioner's license was made by the administrators who did not hear the evidence without it appearing that such decision was made on their own study of the evidence.

Petitioner was deprived of due process in that the administrators were authorized to decide the charges in their discretion without any standard having been set for the exercise of their discretion, thereby permitting an unlimited arbitrary exercise of power.

Petitioner was deprived of due process in that the administrators were authorized to, and did, find petitioner guilty of acts not charged against him.

Petitioner was deprived of due process in that he was charged with, and found guilty of, acts not set forth in the statutes he was charged with violating, and which acts are not within the contemplation of the said statutes.

Petitioner was deprived of due process in that subdivision 2(g) of Section 6514 was enforced against him retroactively.

## ARGUMENT

## POINT I

**This Court has repeatedly stated that it will not be foreclosed to make inquiry, irrespective of the State Court findings that constitutional questions were or were not raised or passed on.**

In the case of *Lanza* v. *State of New York*, decided June 4, 1962, 82 S. Ct. 1218, the Court held in footnote 3, page 1226, quoting from the case of *Honeyman* v. *Hanan*, 300 U. S. 14, 18-19, 57 S. Ct. 350, 352, 81 L. Ed. 476:

> "'A certificate or statement by the state court that a federal question has been presented to it and necessarily passed upon is not controlling. While such a certificate or statement may aid this Court in the examination of the record, it cannot avail to foreclose the inquiry which it is our duty to make or to import into the record a federal question which otherwise the record wholly fails to present.' Indeed, as Honeyman v. Hanan, supra, and Honeyman v. Hanan, 302 U. S. 375, 58 S. Ct. 273; 82 L. Ed. 312, illustrate, proper pursuit of the matter when suspicions are aroused may disclose that a state court's certificate simply did not mean what it appeared, at first glance, to say."

The Federal questions raised herein were properly presented to the Court below, as set forth herein, *supra*, pp. 6-7.

Both the Court of Appeals and the Appellate Division declined to recognize, in their respective opinions (appendix, p. 1a; p. 7a), the Federal questions raised. Their respective decisions, however, establish that their determinations in respect to the Federal questions raised were adverse to petitioner.

Petitioner moved to amend the Court of Appeals remittitur to include the statement that Constitutional questions were raised on the appeal and passed upon, etc., which motion was denied by an order dated May 10th, 1962.

The sufficiency of the grounds of denial of Federal rights are for this Court to decide. *Titus* v. *Wallick*, 306 U. S. 282, 291, 59 S. Ct. 557, 562.

In *Titus, supra*, the court said:

> "* * * sufficiency of grounds of denial [of Federal right] are for this Court to decide."

## POINT II

### Supreme Court makes its own inquiry as to facts of denial of due process.

Despite the denial by the court below of petitioner's claims of violation of due process, this Court has said that it will make its own independent inquiry as to the facts of denial of due process, when the claim is properly asserted. *Pierre* v. *State of Louisiana*, 306 U. S. 354, 358, 59 S. Ct. 536, 539.

In *Pierre, supra*, this Court said:

> "Yet, when a claim is properly asserted— * * * it becomes our solemn duty to make independent in-

quiry and determination of the disputed facts—for equal protection to all is the basic principal upon which justice under law rests."

In *Fay v. State of New York*, 332 U. S. 261, 67 S. Ct. 1613, this Court said at p. 272 of 32 U. S. (p. 1620 of 67 S. Ct.):

> "It is to be regretted that we must deal with questions of fact without aid of findings by the courts whose experience * * * would entitle their findings to very great weight. We would, in any case, be obliged on a constitutional question to reach our own conclusions, after full allowance of weight to findings of the state courts, and in this case must examine the evidence."

And this Court affirmed what was said by the Fourth Circuit in *Sims v. U. S.*, 252 F. 2nd 434, 438, affirmed 359 U. S. 108, 79 S. Ct. 641:

> "Administrative interpretations are not absolute rules of law which must necessarily be followed in every evidence, but are only helpful guides to aid courts in their task of statutory instructions."

## POINT III

**Petitioner was denied the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution. The failure to redress constitutes error.**

The denial of the equal protection of the laws rests as well upon the inequality and severity of the discipline meted out to petitioner by respondent, as measured against noticeably more lenient discipline meted out by respondent to other professional license holders under its supervision for offenses which were far more reprehensible than the acts allegedly committed by petitioner, as demonstrated by

a review of other cases where respondent herein had proceeded against licensees.*

The New York State Court of Appeals in *Morhous v. Supreme Court of New York*, 293 N. Y. 131, supported this contention when it held, at p. 134:

> "The mandate of the Constitution of the United States that no state shall deprive a person of his liberty without due process of law is unheeded by a state only where it has denied to its courts jurisdiction to inquire whether 'through its legislature, through its courts, or through its executive officers' a person has been wrongfully deprived of his liability, or where the court having 'jurisdiction to redress the prohibited wrong,' fails to accord to the injured person the remedy to which he is entitled."

In *Irvin* v. *Dowd*, 359 U. S. 394, 404, 79 S. Ct. 825, 831, this Court quoted the following statement with approval:

> "'the state courts, equally with the courts of the Union, * * * [have an obligation] to guard, enforce, and protect every right granted or secured by the Constitution of the United States * * *.' Robb v. Connolly, 111 U. S. 624, 637, 4 S. Ct. 544, 551, 28 L. Ed. 542."

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* Doctors convicted of crimes involving such offenses as prescribing narcotic drugs in violation of the Public Health Law: *Kay* v. *Board of Regents*, 9 A. D. 2d 560, 189 N. Y. S. 2d 299, 300-301—suspension of license for six months ordered by respondent; *Siegel* v. *Board of Regents*, 15 A. D. 2d 623, 222 N. Y. S. 2d 457—the respondent suspended for six months the license of a dentist on charges of submitting false affidavits of dental services; *Tompkins* v. *Board of Regents*, 299 N. Y. 469, 472—respondent suspended the medical license therein involved for six months for illegally prescribing narcotic drugs; *Genova* v. *Board of Regents*, 272 A. D. 1085, 74 N. Y. S. 2d 729, 730—respondent suspended the medical license therein involved for one year for criminal abortion.

The inequality of treatment based on variation in sentences is denial of the equal protection of the laws. *Neal* v. *Delaware*, 103 U. S. 370.

## POINT IV

**Petitioner has been deprived of a valuable property without due process of law.**

It has been authoritatively held by a New York State court that the right to practice any profession is a valuable property right. *Bender* v. *Board of Regents*, 262 App. Div. 627, 30 N. Y. Supp. 2d 779, 784 (Supreme Court, Appellate Division, Third Department, 1941).

In *Hilfer* v. *Board of Regents*, 283 N. Y. 304, 308, the New York State Court of Appeals said, in respect to the license to practice medicine:

> "Such a license is a valuable right which has been give statutory protection."

It is respectfully submitted that it is well settled and fundamental law that the license also has the protection of constitutional requirements of due process.

## POINT V

**Petitioner was deprived of due process in that he did not have a fair hearing.**

Due process was lacking in revoking petitioner's license. He was not given a fair hearing.

It is implicit within the requirements of a fair hearing that it be held before an impartial tribunal; with reasonable and adequate notice of the charges; with the right to confrontation of witnesses and cross-examination of the evidence.

Further, the hearing was not a fair hearing and due process was lacking as petitioner was found guilty of acts other than those charged against him. There is no provision made in the statute for the charges that have been

made against him. The tribunal was incompetent to perform the judicial functions assigned to it. The tribunal was composed of an industry-wide body of unpaid doctors performing a public and judicial function. The finding of guilt was not supported by any probative evidence. It is not supported by sufficient probative evidence.

A punitive or penal disciplinary statute was enforced retroactively and ex post facto. The administrator who made the final decision did not hear or review the evidence.

The elements of a fair hearing were lacking. Petitioner has, in fact, been deprived of a fair hearing and, therefore, has been deprived of due process in the revocation of his license.

### A. Adequate Notice.

Adequate notice is a pre-requisite to a fair hearing. It pre-supposes that the accused will be given notice of the charges which he is to defend against. It clearly is not adequate notice, within the requirements of due process, if he is charged with one act and is found guilty of some other act, for, although he has been given notice of the act which is charged, he has obviously not been given notice of the act of which he is found guilty.

In the case at bar, it will be noted that the specification of the charges (R. 44, f. 131) charged that petitioner "submitted" bills and medical reports to an attorney, I. Frank Miller, and that said bills and medical reports were false and fraudulent (R. 45, f. 133).

On this charge, the finding of guilt was that petitioner had "issued" such bills and reports (R. 190, f. 570).

There is a substantial distinction between "submit" and "issue." In explanation, it would appear that anyone would be in a position to "submit" medical reports, whereas specific authority would be required to enable one to "issue" medical reports.

The reports herein involved were medical reports. Although no particular authority is required to "submit" a medical report to anyone, it is obvious that only one in possession of a valid license to practice medicine could "issue" a medical report.

Further, the act of "issuing" involves preparation of the report, while "submitting" does not. There is no evidence in the record, nor is there any evidence on which to base an inference, that petitioner prepared the subject reports. See Subcommittee's finding that the attorney "prepared" the subject reports (R. 193, f. 579).

Petitioner was given notice that he had to defend on the charge of "submitting" reports to an attorney, I. Frank Miller, but he was not given notice that he had to defend on the charge of "issuing" false reports.

Thus, it may be said in this case, as it was said by the Court in *Bender* v. *Board of Regents*, 262 A. D. 627, 30 N. Y. S. 2nd 779, at page 783, the complaint he was required to answer did not apprise him of the charges that were proved.

Similarly, in *Hecht* v. *Monaghan*, 307 N. Y. 461, 474, where the petitioner therein was found guilty of acts not charged against him, the Court said:

> "* * * But that was not the ground of which the petitioner had been informed and it is the complaint which defines and limits the charge and the license may not suspended or revoked for some reason or upon some ground other than that specified in the charge, as was done here."

### B. Impartial Tribunal.

Lacking also is the requirement that the tribunal be an impartial one. The New York State courts have repeatedly characterized respondent's tribunal as being a prejudiced forum. In *Bender* v. *Board of Regents*, 262 A. D. 627, 30 N. Y. S. 2nd 779, 784, the Court characterized respondent's

tribunal, in a similar situation, as "a friendly forum of its own selection." The Court further said, at page 785, that:

> "While a proceeding * * * to revoke a license * * * is administrative rather than judicial, and need not be conducted with the exactness, formality or technicality required before a judicial tribunal, nevertheless the holder of a license cannot be deprived of it without due process of law; or in other words, without due notice and a full opportunity to be heard before an impartial tribunal, nor without clear and convincing proof of his guilt.
>
> The proof in the record before us does not meet those tests * * *."

In *Application of Epstein*, 267 A. D. 27, 44 N. Y. S. 2nd 921, 922, the Court said:

> "Generally speaking, in quasi-judicial proceedings before administrative agencies, where the same agency is both the prosecutor and judge, with the resultant tendency to predetermine, practically the only shield left open to the accused is his right of cross examination. Deprived of this, he stands defenseless before a tribunal predisposed to conviction."

In *Epstein, supra*, the tribunal so characterized is respondent's tribunal holding a hearing in the revocation of a physician's license, as in the case at bar.

Respondent's tribunal is obviously therefore, a forum, characterized by the courts of New York State as respondent's friendly forum, where it is both accuser and judge, predisposed to conviction and, therefore, does not meet the requirements of due process that the hearing be held before an impartial forum. It is thus established beyond cavil that respondent's forum is, in fact, a prejudiced forum.

In *Bender, supra*, the Court specifically held that:

> "The procedure invoked against petitioner in the cause before us violates the essentials of a sound judicial proceeding." (p. 784 at 30 N. Y. S. 2d.)

Further evidence of lack of impartiality is found in the colloquy between respondent's committee chairman, Dr. Boland, and petitioner's then attorney, which took place at the termination of the subject hearing (R. 182, f. 546 *et seq.*).

This colloquy demonstrates that Dr. Boland, himself apparently a practicing physician, was concerning himself with the percentage of petitioner's work in his specialty, which was obviously no part of the subject matter before the sub-committee.

This serves to demonstrate the point of view expressed in this Court's disapproval of the use of a private industry body to perform a public function with respect to its own industry on the ground that competitive or professional prejudice may supervene. (*Carter* v. *Carter Coal Company*, 298 U. S. 238, 311, 56 S. Ct. 855, 873).

See also *Tumey* v. *Ohio*, 273 U. S. 510, at pp. 522 and 535, re the judge being a member of the class or group involved in the hearing before him.

### C. Petitioner Was Deprived of Due Process as His Hearing Was Not Held by a Competent Tribunal.

In holding the subject hearing, respondent's subcommittee was acting in a judicial, or at least quasi judicial, capacity.

In this regard, the New York State Court of Appeals in the case of *Hecht* v. *Monaghan*, 307 N. Y. 461, 469 said:

> "Revocation of a license—even where the same rests within the discretion of an administrative official—is not a legislative act. Mandell v. Board of Regents of University of State of New York, 250 N. Y. 173, 177, 164 N. E. 895, 897, where, as in the present case, the statute empowers the agency to revoke a license * * *, then the administrative act is of a judicial nature since it depends upon the ascertainment of the existence of certain past or present facts upon which a decision is to be made and rights and liabilities determined. It is clearly not a merely ad-

> ministrative act concerned with the internal funtioning of the agency itself, but it is a judicial or quasi judicial function of the administrative body."

Similarly, in respect to this respondent's subcommittee holding a hearing on charges against another physician, the Appellate Division of the New York State Supreme Court said:

> "This subcommittee had the duty to conduct the hearing and weigh the testimony in a manner that should have been at least quasi judicial." *Stammer* v. *Board of Regents*, 262 A. D. 372, 29 N. Y. S. 2d 38, 39.

In *Morgan* v. *United States*, 298 U. S. 468, 480, 56 S. Ct. 906, 911, this Court said in respect to an administrative hearing:

> "A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding hence it is frequently described as a proceeding of a quasi judicial character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts".

The authorities are abundant and clear that respondent's hearing is a judicial, or at least a quasi-judicial, hearing and that petitioner, as the accused participating in such a hearing, is entitled under due process to a tribunal mentally competent to conduct such a hearing.

In *Inland Steel Co.* v. *National Labor Relations Board*, 109 F. 2d 9, 20, the Seventh Circuit said, quoting this Court from *Jordan* v. *Massachusetts*, 225 U. S. 167, 176, 32 S. Ct. 651, 652:

> "Due process implies a tribunal both impartial and mentally competent to afford a hearing. * * *"

Examination of the facts in regard to the mental competency of respondent's subcommittee to hold and conduct a judicial or quasi-judicial hearing establishes the following circumstances.

New York Education Law § 6515, as it read at the time of the proceedings against petitioner herein, provided for the procedure to be followed in disciplinary proceedings against physicians. It provided, in subdivision 1, for a committee on grievances to be composed of ten members to be appointed by the Regents. It provided, in subdivision 2, that the members of the Grievance Committee should be nominated by specified medical or osteopathic societies having a specified number of members and that the Regents were to appoint, from such nominees, four members nominated by the Medical Society of the State of New York, two members by the New York State Homeopathic Society, one member by the New York State Osteopathic Society, and three members of conspicuous professional standing were to be on the Regents' own nomination. Members of the committee were required to be duly licensed physicians of the State. Subdivision 4 delegated to this Committee jurisdiction to hear all charges against duly licensed physicians for violation of the provisions of § 6514 (except subdivision 1, not relevant hereto).

Subdivision 4 further authorized the Chairman of the Committee to designate a subcommittee of three or more members to hear charges that are preferred against any licensed physician, such subcommittee to hear and report upon the charges to the full Committee.

Subdivision 5 provided that the Committee on Grievances shall not be bound by the laws of evidence in the conduct of its proceedings, but the determination shall be founded upon "sufficient legal evidence to sustain the same".

Clearly, therefore, the Grievance Committee, or its sub-committee holding a hearing, is authorized and required to sit in a judicial or quasi-judicial capacity to receive, admit or reject evidence offered, to determine questions of law in respect to violation of statutes, to weigh the credibility of witnesses, to evaluate testimony, to weigh testimony, to find facts, to sift hearsay evidence from so-called "legal" evidence and to determine finally if there is "sufficient legal evidence" produced during the hearing to sustain a finding of guilty.

It is respectfully submitted that a duly licensed physician of the State of New York has no training, qualifications, or competency to perform the aforementioned acts, regardless of how prominent or capable a member of the medical profession he may be.

The function they are called upon to perform is a judicial function, their training is in the field of medicine. Nothing in their medical training provides the necessary mental background to perform the judicial or legal work involved in holding the hearing herein under consideration.

Licensed physicians, although charged with the duty under existing statute, are not capable of determining whether the charges so brought, based on acts not specifically set forth in the statutes, constitute violations of constitutional rights.

### D. Petitioner was Deprived of Due Process in that he was Deprived of the Right of Confrontation and cross-examination.

The record indisputably establishes that the sub-committee's finding of guilt was based on hearsay, thereby depriving petitioner of his fundamental right to confront the witnesses against him and depriving him of the fundamental right of cross-examining the evidence against him (*People* v. *Kendricks*, 300 N. Y. 544; *Snyder* v. *Massachusetts*, 291 U. S. 97, 106, 54 S. Ct. 330, 332).

**E. Petitioner's Right to Due Process Was Violated by an Industry Body of Unpaid Private Citizens Performing a Public and Judicial Function of Holding the Hearing Resulting in Revocation of His License.**

New York Education Law, § 6515, as it read in 1960 when the charges against petitioner were heard, provided, in subdivisions 1 and 2 thereof, that respondent's Committee on Grievances was to be composed of ten members, to be appointed by the respondent. The nominations to such Committee were to be by any duly incorporated State Medical or Osteopathic Society having 200 or more members. From these nominations, respondent was to appoint a Committee consisting of four members nominated by the Medical Society of the State of New York, two members by the New York State Homeopathic Society, one member by the New York State Osteopathic Society, and three members were to be appointed on the Regent's own nomination. It was mandatory for each member of the Committee to be a duly licensed physician of the State.

There is no provision for these members of the Committee to be paid compensation or salaries.

Under subdivision 4, members of this Committee were given jurisdiction to hear all charges against duly licensed physicians for violation of the provisions of § 6514 (except subd. 1). The Committee was charged with determining, upon such hearing, the charges upon their merits.

The Chairman of the Committee was authorized to designate three or more members of the Committee to hear and report upon such charges to the Committee.

The subdivision further provided for notice of hearing, the service of charges on the accused and for the accused to have the opportunity to appear either personally or by counsel at the hearing, where a stenographic record of the proceedings would be kept, with the right to produce evidence and witnesses upon his own behalf, to cross-examine

such witnesses, to examine such evidence as may be produced against him and to have subpoenas issued by the Committee. The subcommittee to whom such charges were referred was required to make a written report of findings and recommendations which were to be transmitted to the Secretary of the Grievance Committee with a transcript of the evidence.

The Grievance Committee was authorized to act upon such recommendations *as it should deem fit* and to take further testimony, if the same should seem desirable in the interest of justice.

The Committee was required to determine the charges upon their merits.

Under subdivision 5, the Committee, or any member thereof, was authorized to issue subpoenas and administer oaths in connection with any hearing under the Article.

Subdivision 5 further provided that the Committee was not to be bound by the laws of evidence in the conduct of its proceedings, but its determination was required to be founded upon *sufficient legal evidence to sustain the same.*

Clearly, from the above resumé, said § 6515 provided for the performance of a public function and a judicial function by an unpaid body of private citizens drawn from a specific industry or professional body of practitioners; to wit, licensed physicians.

That they were performing these public and judicial duties as private citizens is evidenced by the fact that they were unpaid and unsalaried, and it is a fair inference that the members of this Committee continued to carry on their private medical practice while they were in the performance of this public and judicial duty.

In *Fink* v. *Cole*, 302 N. Y. 216, 225, the New York State Court of Appeals held the delegation of a public function to a private corporation to be unconstitutional.

In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311, 56 S. Ct. 855, 873, this Court frowned on a similar practice and labelled as unconstitutional a statute which attempted to confer performance of a public function on an industry group of private citizens.*

Similarly, in *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 529, 537, 55 S. Ct. 837, 843, 846, this Court disapproved of the delegation of a public function to a private industry group.

**F. Petitioner Was Deprived of Due Process in That Acts Charged Against Petitioner Were Not Set Forth, Defined or Contained in Statutes Charged.**

Under 2(a), petitioner was charged with "submitting" false medical bills and reports to an attorney, I. Frank Miller.

Under 2(g), he was charged with entering into an illegal conspiracy with I. Frank Miller.

Subd. 2(a) provides that the license of a physician may be revoked, suspended or annulled if the physician is guilty of "fraud or deceit in the practice of medicine".

§6501, subd. 4, defines the practice of medicine as a holding out of "being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition" and an offering or undertaking "by any means or method, to diagnose, treat, operate or pre-

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* "And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. Schechter Poultry Corp. v. United States, 295 U. S. 495, at page 537, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A. L. R. 947; * * *"

*Carter* v. *Carter Coal Co.*, *supra*.

scribe for any human disease, pain, injury, deformity or physical condition".

Therefore, there is no statutory definition that includes the alleged acts of "submitting" false reports within the meaning and scope of the term "in the practice of medicine", as it is used in subd. 2(a).

Therefore, the acts charged against the petitioner as a violation of subd. 2(a) are not set forth, defined or contained in subd. 2(a).

Similarly, under subd. 2(g), petitioner was charged with entering into an illegal conspiracy with Miller.

Subd. 2(g) provides that disciplinary proceedings may be invoked against a physician, if the physician "is or has been guilty of unprofessional conduct".

The subdivision goes on to give the regents power to promulgate rules to give effect to this subdivision. However, petitioner has not been charged with violation of any rules that may have been promulgated pursuant to this subdivision.

2(g) clearly makes no reference to the charged act of "conspiracy" and it is clear, therefore, that petitioner has been charged with an act in violation of 2(g) which is not set forth, defined or contained in the said subdivision.

It is obvious from a reading of subd. 2(a) and 2(g) that the legislature has failed to define the offenses that are charged against petitioner as being within the scope of the said subdivisions.

It is well settled law that the definition of offenses is an exercise of the legislative function. *U. S.* v. *Eaton*, 144 U. S. 677, 27 S. Ct. 764.

The failure of the legislature to set forth definite standards in the said subdivisions renders the said subdivisions constitutionally void for lack of a definite standard.

The said subdivisions, therefore, fall within the prohibition laid down in *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, 59 S. Ct. 618, 619, where the court said:

> "No one may be required to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids . . ."

In finding petitioner guilty of the acts charged against him, respondent has been unconstitutionally exercising a legislative function in making its own standards *re* the definition of offenses.

If it be assumed, *arguendo*, that the respondent has this authority, then clearly it would have been given an unconstitutional delegation of legislative authority.

On the other hand, it may equally as validly be contended that the legislature has given respondent an unconstitutional delegation of legislative authority to set the standards, and that the subdivisions are void for lack of a definite standard.

In finding petitioner guilty of a violation of these said subdivisions therefore, respondent has deprived petitioner of his constitutional right to due process.

**G. Petitioner Was Deprived of Due Process in That He Was Found Guilty of Acts Not Charged Against Him.**

See discussion in subnote A, *supra*, pages 16-17.

In *Dejonge* v. *State of Oregon*, 29 U. S. 353, 362, 57 S. Ct. 255, 259, this Court said:

> "Conviction upon a charge not made would be sheer denial of due process."

**H. Petitioner Was Deprived of Due Process by the Finding of Guilt Based on Hearsay and Not Supported by Evidence of Probative Value.**

The record (R. 54-129) is saturated and replete with hearsay offered and received against petitioner at respondent's hearing.

There is no material or relevant evidence of probative value to establish the charge that petitioner "submitted" false reports and bills to Miller, or to support the finding that petitioner "issued" them.

The probative evidence establishes only that petitioner signed reports for Miller, when Miller presented them to petitioner, without petitioner examining the contents thereof. (See Sub-committee's "Findings", R. 193, f. 579 and Point XII, *infra*, p. 48).

This testimony is neither contradicted nor refuted.

Similarly, there is no material or relevant evidence of probative value to establish the charge that petitioner entered into an illegal conspiracy with Miller.

The finding of guilt, therefore, was predicated on hearsay and was not supported or substantiated by sufficient legal evidence, and is contradicted by the findings of fact. (R. 193, f. 579; Point XII, *infra*, p. 48).

In *Cosmopolitan* v. *Feuchtwanger*, 226 N. Y. S. 2d 584, 592, it was held that suspicion and conjecture cannot take the place of evidence.

**I. Petitioner is Deprived of Due Process in That Punitive or Penal and Disciplinary Statute Was Enforced Against Him Retroactively and *Ex Post Facto*.**

Subdivision 2(g), § 6514, became effective April 13, 1953.

Respondent enforced the said section against petitioner with respect to acts allegedly committed in 1951 and 1952.

Since a disciplinary statute accusing the accused of an offense against the public and providing for a penalty or forfeiture therefor has been held to be akin to a penal statute, it follows that the constitutional prohibition against *ex post facto* laws is therefore applicable to the subject statute, subd. 2(g).

It follows, therefore, that, on the basis of such a well settled and fundamental rule of law, 2(g), aside and apart from its other constitutional deficiencies, cannot constitutionally be applied to acts allegedly committed by petitioner prior to the effective date of 2(g). *Hopt* v. *Utah*, 110 U. S. 574.

**J. Petitioner Was Deprived of Due Process by Respondent's Use of False Exhibit as Evidence, in Lieu of Original Exhibit.**

It affirmatively appears (from respondent's letter, dated February 10, 1961, *supra*, p. 5), that petitioner's Exhibit D, introduced into evidence at respondent's hearing (R. 154), was somehow lost after it was received in evidence and that the hearing stenographer thereupon typed up a copy which was thereafter used as Exhibit D without it being made known by respondent that it was in fact a substitute for the original exhibit.

Not until after the matter was argued and submitted to the Appellate Division was it made known by respondent in the said letter of February 10th that this was the sequence of events.

The said explanatory letter of February 10th, however, is dehors the record and there is no indication as to what consideration, if any, was given to it by the Appellate Division in its consideration of the matter.

The fact is that it was the *false* exhibit that was before the Appellate Division during its consideration of the matter and the Court has not indicated it was aware that the exhibit before it was false.

It is a fair inference that the said false exhibit was the one considered by the respondent's hearing sub-committee when it reviewed the evidence, and it is a fair inference that any further review of the evidence by respondent's subsequent administrative procedures involved the use of this same false exhibit.

It seems likely, therefore, that the respondent's various administrative committees were deceived by this false exhibit, as well as the Court in its judicial review of the matter.

Considerable weight might have been given to this false exhibit by any reviewer of the evidence, based on the fact that the false exhibit was typewritten, whereas petitioner had contended that he was unable to submit any reports to Mr. Miller because he lacked secretarial services.

The false Exhibit D being a typewritten document, rather than the handwritten original exhibit, it clearly would tend to destroy both petitioner's credibility and his contention that the typed reports, which were the subject matter of the charges herein, were prepared by Miller, rather than by petitioner. This false exhibit, therefore, would obviously be a vital factor in destroying his credibility before the hearing committee, before the subsequent reviewing committees and before the Courts.

Obviously, in view of the use made of this false exhibit, petitioner was denied a fair hearing and has been deprived of due process.

In a somewhat similar situation, this Court has said:

> "Suppression of evidence or its concealment from a party whose rights are being determined by the administrative tribunal has been held to be so unfair as to invalidate the administrative proceeding * * *. It is equally offensive to conceal from the experts, whose judgment is accepted as controlling, facts

which might properly have influenced their opinion." *Lloyd, etc.* v. *Elting*, 287 U. S. 329, 339, 53 S. Ct. 167, 172.

It is respectfully submitted that under these circumstances the irregular use of this false evidence requires a new hearing in the interest of justice.

*Lewis* v. *Johnson* (1 Cir. 1926), 16 F. 2d 180, 182.

**K. Due Process is Lacking Where, as Here, the One Who Decides Did Not Hear the Evidence.**

It has frequently been held that due process is lacking and a fair hearing has not been given if the one who decides the matter did not hear the evidence.

It was so stated by this Court in *Morgan* v. *United States*, 298 U. S. 468, 480-481, 56 S. Ct. 906, 911, where the Court stated:

> "If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

The record herein will demonstrate (R. 204) that the respondent voted on September 30, 1960, to accept the Regents' Committee on Discipline's recommendation that petitioner's license be revoked, and nowhere does it appear that, in accepting this recommendation, the Board of Regents made any study of the evidence or reviewed the matter in any way.

In a somewhat similar situation, involving another administrative agency of the State of New York, the New York State Supreme Court said:

> "It is the function of the respondent to exercise its discretion on the basis of evidence in the record, not on a resume and recommendation of the hearing officer. If the determination is based merely on the

resume and report of the hearing officer it is in fact a determination of the hearing officer and not of the respondent. The statute does not permit the respondent to delegate to a subordinate its powers to approve or reject applications." *O'Dea's Bar and Restaurant, Inc.* v. *New York State Liquor Authority*, 201 N. Y. S. 2d 340, 342 (S. Ct., Sp. Term, Nassau County, 1960).

## POINT VI

**Petitioner has been deprived of due process, as due process requires that police power, penal and/or disciplinary statutes must be strictly construed.**

In *Marburg* v. *Cole*, 286 N. Y. 202, 206, the New York State Court of Appeals held that licensing of doctors is an exercise of the police power of the state.*

The New York State Court of Appeals in the case of *In re Donegan*, 282 N. Y. 285, said at page 292 (in respect to revocation of a license to practice law) that a statute revoking a license must be strictly construed:

> "But there is a further reason for such an interpretation. Although disbarment is not strictly a punishment for crime, but only the withdrawal of a privilege (Matter of Rouss, 221 N. Y. 81, 91, 116 N. E. 782), it cannot be denied that the requirement of automatic and irrevocable disbarment for life provided by the Judiciary Law, is in effect a consequence most severe, and partakes of the nature of punishment. Hence the statute must be interpreted in the light of the fundamental canon that penal statutes must be strictly construed."

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* "In order to protect the health and provide for the welfare of the citizens of the state, the Legislature in the exercise of the police power of the state has enacted laws requiring a certain standard of learning and training of those who undertake to preserve or repair the human body."

*Marburg* v. *Cole*, 286 N. Y. 202, 206.

Obviously, there is no distinction between the revocation of a license to practice law and revocation of a license to practice medicine. It follows, therefore, that the subject statutes herein involved must be strictly construed, as is the rule with penal statutes. *Hilfer* v. *Board of Regents*, 283 N. Y. 304, 308.

See also *People* v. *Bene*, 288 N. Y. 318.

It is therefore clearly the law in New York State that penal or disciplinary statutes must be strictly construed in a manner not to embrace cases which do not clearly fall within their terms and that such statutes can not be extended by intendment and no act, however wrongful, can be punished under such a statute unless clearly within its terms (*People* v. *Levy*, 128 N. Y. S. 2nd 275, 283 A. D. 383).

This Court held in *Lanzetta* v. *State of New Jersey*, 306 U. S. 451, 453, 59 S. Ct. 618, 619, that:

> "No one may be required at peril of * * * property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids."

The Court went on to quote the applicable rule as stated in *Connally* v. *General Construction Company*, 269 U. S. 385, 391, 46 S. Ct. 126, 127:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

In this regard, subds. 2(a) and 2(g) of Education Law. Sec. 6514 clearly do not define, set out or prohibit the acts charged against petitioner.

Subd. 2(a) provides that a physician may be disciplined on a finding:

> "That a physician * * * is guilty of fraud or deceit in the practice of medicine * * * ". (appendix, p. 24a)

2(a) clearly provides that a licensee may be disciplined for fraud or deceit in the practice of medicine, but does not define or set out what acts shall constitute such fraud and deceit.

This clearly falls within the prohibitions set forth hereinabove that such statute may not be enlarged or extended beyond its clear meaning and that those who are subject to its control should not be required to speculate as to what acts are prohibited by the statute. The statute is required to clearly define the prohibited acts so that those whose conduct is to be controlled may clearly know, without speculation, what the prohibited acts are. *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, 59 S. Ct. 618, 619.

It is further contended that the acts charged against petitioner were not performed "in the practice of medicine", as that term is defined in the New York State Education Law, Sec. 6501, subd. 4, which reads as follows:

> "The practice of medicine is defined as follows: A person practices medicine within the meaning of this article, except as hereinafter stated, who holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, and who shall either offer or undertake, by any means or method, to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition."

Clearly, the term "in the practice of medicine" does not include within the statutory definition the act charged against petitioner of "submitting" false and exaggerated bills to an attorney and does not include within the statutory definition the act that he was found guilty of, to wit, that he "issued" false and fraudulent bills and medical reports.

It is fundamental law that the administrative agency charged with enforcing a disciplinary statute may not extend the scope of that statute or enlarge it in any degree whatsoever. *Hilfer v. Board of Regents*, 283 N. Y. 304, 308.

It appears clear that the respondent herein has violated this fundamental concept of constitutional law and, without a statutory standard being given to it by the Legislature, has taken unto itself the power to determine its own standards as to what shall constitute "fraud or deceit in the practice of medicine"; and has undertaken to extend its authority to penalize or control conduct not within the statutory definition of "practice of medicine."

What was said hereinabove with respect to Subd. 2(a) is also applicable to Subd. 2(g), which provides:

> "That a physician is or has been guilty of unprofessional conduct." (appendix, p. 24a).

It should be noted that the remainder of the sub-division provides that respondent herein "shall have power to promulgate rules to give effect to this section" but it should be further noted that petitioner was not charged with violation of any rule that may have been promulgated by the respondent and was, in fact, charged only with violation of the sub-division itself.

**The statute clearly appears to be vague and indefinite and no standard is set by the Legislature as to what conduct is prohibited by its terms.**

Under this sub-division, petitioner was charged with, and found guilty of, an illegal conspiracy based on the alleged submission of false and fraudulent medical bills and reports.

Again, nothing in the statute prohibits the conduct charged against petitioner. The statute, therefore, if it can be charged against petitioner, is constitutionally defective because it fails to inform those whose conduct is to be controlled as to what acts are prohibited. *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, 59 S. Ct. 618, 619.

Only by speculation, alone, can one arrive at a determination of what would be or might be "unprofessional conduct."

Under the said statute, it necessarily follows, therefore, that respondent, in construing 2(a) and 2(g), has broadened the terms thereof so as to include and prohibit conduct not specifically prohibited by the Legislature; and, in so doing, respondent has assumed a power and authority that constitutionally it does not and cannot possess.

The acts charged against petitioner may not be included within the contemplation of 2(a) and 2(g) except by implication. Such inclusion by implication is constitutionally prohibited. (*People* v. *Levy*, 283 A. D. 383, 128 N. Y. S. 2nd 275; *People* v. *Bone*, *supra*, 288 N. Y. 318; *Lanzetta* v. *State of New Jersey*, *supra*, 306 U. S., 451, 453, 59 S. Ct. 618, 619; in re *Donegan*, *supra*, 282 N. Y. 285, 292; *Gooch* v. *U. S.*, 297 U. S., 124, 128, 56 S. Ct., 395, 397)

In *People* v. *Kightlinger*, 89 N. Y. S. 2nd 755, modified 93 N. Y. S. 2nd 636, affirmed without opinion 301 N. Y., 639, the court held that a penal statute must be construed against the state, and may not be given a construction adding to the provisions of the statute something that is not clearly contained or defined therein.

And in *People* v. *Glubo*, 5 N. Y. 2nd, 461, 186 N. Y. S. 2nd 26, the New York State Court of Appeals held penal statutes should apprise the citizenry of exactly what is forbidden.

Clearly, 2(a) and 2(g) do not apprise the citizenry affected by their terms of "exactly" what is forbidden. In *People* v. *Shapiro*, 4 N. Y. 2nd 597, 176 N. Y. S. 2nd 632, the New York State Court of Appeals held that penal statutes are to be strictly construed against the parties seeking their enforcement and are to be construed in favor of persons being proceeded against.

To emphasize that we are here concerned with a penal statute, or one which is to be construed as a penal statute, reference is made to the case of *Olsen* v. *Olsen*, 27 Misc. 2nd, 555, 209 N. Y. S. 2nd 503, where the court held that the test of the penal character of a statute is whether it appears, to the tribunal which is called upon to enforce it, to be a punishment of an offense against the public; and to the case of *Julien J. Studley, Inc.* v. *Geisinger*, 12 Misc. 2nd 527, 177 N. Y. S. 2nd 776, affirmed 7 A. D. 2nd 844, 182 N. Y. S. 2d 326, where the court held that a statute prescribing a penalty must be strictly construed.

## POINT VII

**Petitioner was deprived of due process in that lack of an adequate or intelligible standard in 2(a) and 2(g) renders them void and violative of due process.**

Since 2(a) and 2(g) do not establish or contain adequate or explicit standards as to what conduct is prohibited, the administrative agency charged with their enforcement has been delegated unfettered discretion to set the standards of conduct, and such delegation of legislative function is constitutionally defective, with the result that the said sections are, therefore, void.

2(a), providing for disciplinary action against a physician guilty of fraud or deceit in the practice of medicine, does not delineate what acts constitute fraud or deceit, although the term "in the practice of medicine" is defined in §6501, subd. (4) of Education Law.

Respondent may not supply the missing part that is to make the statute whole or valid, for that is constitutionally a legislative function which respondent cannot constitutionally perform and which the Legislature may not constitutionally delegate to it.

The same is true of 2(g). It purports to provide disciplinary measures for unprofessional conduct, but does not set out what acts constitute "unprofessional conduct".

Petitioner was charged with "conspiracy" under 2(g), but that charge is not set out in the statute.

Here, too, respondent may not set its own standard of conduct to supply what the Legislature omitted.

This delegation of unfettered discretion by the Legislature has been disapproved in *Fink* v. *Cole*, 302 N. Y. 216, 225; *Packer Collegiate Institute* v. *University of State of New York*, 298 N. Y. 184, 189, 191-192; *Small* v. *Moss*, 279 N. Y. 288, 299; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 55 S. Ct. 241; *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 55 S. Ct. 837.

See also *Chicago, etc.* v. *Chicago*, 166 U. S. 226, 234-235.

Clearly, the definition of offenses is the exercise of legislative function. *United States* v. *Eaton*, 144 U. S. 677, 27 S. Ct. 764.

In *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, 59 S. Ct. 618, 619, this Court said:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." The applicable rule

is stated in Connally v. General Const. Co., 269 U. S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

Under the well settled rules of constitutional construction, 2(a) and 2(g) are invalid as repugnant to such constitutional rules.

## POINT VIII

**Petitioner was deprived of due process in that the delegation of unfettered discretion to respondent in the pertinent provisions of § 6515 is contrary to constitutional requirements of due process and the subject provisions are, therefore, constitutionally void.**

Under subdivision (4) of § 6515, as it read at the time of the subject hearing herein, the subcommittee hearing the charges was required to make a written report of its findings and recommendations, which was to be transmitted to the Committee on Grievances.

The subdivision then provided:

> "said grievance committee may thereupon act upon such recommendation *as it shall deem fit*, * * *". (Italics supplied.)

This is clearly unfettered and unlimited delegation of discretion without any standards whatsoever to guide the

Committee in its actions. It is clearly given authority to take such action "as it shall deem fit", without any limitation.

The same subdivision, (4), then goes on to provide for the transmitting to the Department of Education of the record, findings and determination, if the practitioner has been found guilty, along with their recommendation, and the Regents are then authorized to:

> "* * * *in their discretion* execute an order accepting or modifying such determination of the Committee as hereinabove provided." (Italics supplied.)

Here, again, is a delegation of unlimited and unfettered discretion to take whatever action the Regents decide to take in the exercise of their own discretion, without any standard whatsoever to guide their conduct or to guide or limit their discretion.

In subdivision (5), the Grievance Committee was authorized to be free from the requirements of the laws of evidence in the conduct of its hearings and it is further provided that:

> "* * * but the determination shall be founded upon sufficient legal evidence to sustain the same."

Here, again, no standard is set to guide the Committee as to what shall constitute "sufficient legal evidence", and the Committee of legally untrained doctors is free to determine for itself what shall constitute "sufficient legal evidence".

Obviously, it is not possible to determine from this delegation of discretion to the Committee whether a "preponderance" of legal evidence is sufficient legal evidence, whether "substantial" legal evidence is sufficient legal evidence, whether "some" legal evidence is sufficient legal evidence, or whether a "scintilla" of legal evidence is sufficient legal evidence.

From all of the above, it is clear that completely unfettered discretion has been delegated to the Committee under the provisions of §6515 and that this unfettered delegation of discretion without limit or standard violates constitutional rules and is, therefore, void. *Packer Collegiate Institute* v. *University of New York*, 298 N. Y. 182, 189; *Small* v. *Moss*, 279 N. Y. 288, 299.

In *Small* v. *Moss*, *supra*, at page 299, the Court said:

> "The Legislature must set bounds to the field, and must formulate the standards which shall govern the exercise of discretion within the field. Without the second rule as a corollary to the first rule there would be no effective restraint upon unfair discrimination or other arbitrary action by the administrative officer."

## POINT IX

**Petitioner was deprived of due process in that Education Law § 211 is an unconstitutional delegation of unfettered discretion to the respondent to make an arbitrary determination, regardless of the evidence, and such provision is unconstitutional and void.**

Education Law, § 211, provides for hearings to be held upon the record before a subcommittee of the Regents, which subcommittee shall render a written report to the Regents, including a statement as to the findings of fact and the evidence, together with their recommendations, and it further provides that:

> "* * * and the Regents, without further hearing, shall *in their discretion* execute an order accepting or changing the determination of the Grievance Committee or Board of Examiners." (Italics supplied.)

Here, obviously, the Board of Regents was given completely unfettered discretion to make whatever determination they shall, in their discretion, see fit, with no limits whatsoever set to the exercise of their discretion.

Obviously, under this provision, the Regents could find an accused guilty, even if the evidence conclusively established innocence.

This is clearly the exercise of arbitrary power, prohibited by constitutional rules. *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 55 S. Ct. 837.

In *Stuart v. Palmer*, 74 N. Y. 183, 188, the New York State Court of Appeals held that the constitutional validity of the law is to be tested not only by what *has* been done under it, but by what *may* be done under its authorization.

## POINT X

**Petitioner was deprived of due process in that the respondent's Committee on Grievances was not properly constituted in accordance with the provisions of subdivisions 1 and 4 of § 6515, and these proceedings were, therefore, void, resulting in lack of due process in the revocation of petitioner's license.**

§ 6515, as it read at the time of the subject hearing, provided in subdivision 1 that the Grievance Committee was to consist of ten members appointed by the Regents.

Subdivision (4) provided that the members of such Committee shall have jurisdiction to hear all charges against duly licensed physicians for violation of the provisions of § 6514 (except subd. 1).

In lieu of a hearing by the committee of the whole, subdivision (4) authorized the Chairman of the Committee to designate three members of the Grievance Committee to act as a subcommittee to hear the charges.

When such charges were referred to a subcommittee to hear and report, the subcommittee was required to make a

written report of its findings and recommendations to be transmitted to the Committee on Grievances with a transcript of the evidence.

Subdivision (4) then went on to provide that:

> "Thereupon the Committee shall determine such charges upon their merits (the vote of each member of such Committee to be recorded as part of the Committee's findings). If by unanimous vote the practitioner is found guilty of such charges or any of them the Committee shall transmit to the Department the record, findings and determination * * * ".

Clearly, therefore, subdivision (4) is specifically and unequivocally providing that a finding of guilty could result only from the *unanimous* vote of the full Committee of ten members.

In respect to this same provision of subdivision (4), the New York State Court of Appeals in the case of *Hilfer* v. *Board of Regents*, 283 N. Y. 304, said at page 308:

> "'The mode or way in which the act shall be done or the determination reached * * * must be strictly pursued, otherwise the act or the determination will be void.'"

The Court below reached a clearly erroneous interpretation when it interpreted subd. 9 as providing that the Grievance Committee could vote a finding of guilty with only a quorum of the Committee.

That this interpretation is erroneous is clearly demonstrated by a close reading of the said subd. 9. It clearly appears therein that a quorum of the Committee is permitted to act *only when it is sitting as a Committee of the whole for the sole purpose of conducting a hearing.*

The provisions of subd. 9 thus do not conflict with the provision in subd. 4 that, when a subcommittee holds the hearing and reports thereon to the Committee, the Com-

mittee's vote must be *a unanimous vote of the full ten members*. There is no provision made for the unanimous vote to be by a quorum of the Grievance Committee.

Since it is undisputed that the vote of the Grievance Committee in the case at bar consisted, not of the unanimous vote of *ten members*, but of the unanimous vote of *nine members* (R. 197), the proceedings of the said Grievance Committee are null and void, as not being performed in full compliance with the statutory requirements. *Hilter v. Board of Regents, supra*, 283 N. Y. 304, 308.

In *People v. Grandstein*, 245 N. Y. S. 523, the Appellate Division held that penal statutes must be strictly construed in favor of the accused.

*In re Donegan*, 282 N. Y. 285, the New York State Court of Appeals held at page 292 that a disciplinary statute, just as a penal statute, must be strictly construed. The Court said of such a statute:

> "Hence the statute must be interpreted in the light of the fundamental canon that penal statutes must be strictly construed."

In *People v. Kightlinger*, 89 N. Y. S. 2d 755, modified 93 N. Y. S. 636; affirmed 301 N. Y. 639, without opinion, the Court held that a penal statute must be construed against the State.

In *People v. Shapiro*, 4 N. Y. 2d 597, the New York State Court of Appeals held that penal statutes are to be strictly construed against the parties seeking their enforcement and in favor of persons being proceeded against.

Petitioner's contention in this regard is emphasized by a reading of the present provisions of § 6515, which now provides in subdivision (4) that, at any meeting of the Committee, the presence of a quorum shall be necessary, followed by the new provision in subdivision (4), in respect to the unanimous vote, which now reads that:

"If by unanimous vote *of the members present* the practitioner is found guilty of such charges * * *". (Material italicized is new.)

This italicized new material, coupled with the new requirements of subdivision (1), that a quorum shall be necessary at any meeting of the Committee, emphasizes that, under the *present* § 6515, a unanimous vote of a quorum is sufficient.

These changes became effective in 1961 and do not affect the hearing that was held in the case at bar, in 1960.

The changes, however, serve to demonstrate the validity of the contentions hereinabove set forth, to wit, that at the time petitioner's hearing was held, the unanimous vote of the ten members of the Grievance Committee was required for a finding of guilt.

It is further submitted that the statutory requirement that the committee consist of 10 men renders a 9 man committee a nullity, and the proceedings of a committee that is a nullity can have no validity and are void.

The quorum provisions of subd. 9 of sec. 6515 apply only when the committee of the whole chooses to hold the hearing on charges against a physician instead of delegating the hearing to a subcommittee, in which case a quorum of 6 was authorized to proceed with the hearing, but the quorum provision clearly did not authorize the committee to be constituted of less than the 10 set in the statute, subd. 1 of sec. 6515.

## POINT XI

**Petitioner's constitutional rights were violated when he was compelled to testify against himself and was deprived of the aid of counsel.**

Petitioner was subpoenaed and compelled to appear and testify before the so-called Arkwright Committee.

During his interrogation, petitioner's attorney was excluded from the hearing room, so that petitioner was deprived of the aid of counsel, in violation of his constitutional rights.

The rule of law, that a witness has no right to the aid of counsel is not applicable when the witness, so-called, is, in fact, the target of the inquiry, or one of the targets, as here.

The actual circumstances demonstrate that Mr. Justice Arkwright, conducting the hearings, peremptorily excluded petitioner's counsel during the course of petitioner's interrogation.

As is now evident, petitioner was in fact a prospective defendant within the contemplation of the said investigation.

**He Was Not Informed That He Was a Prospective Defendant.**

It is respectfully submitted, therefore, that under the said circumstances, petitioner had a constitutional right to aid of counsel at all stages of the proceeding, and that his constitutional rights were violated in that he was compelled to be a witness against himself.

In respondent's hearing, the fruits of the unconstitutional violation, the minutes of the interrogation of petitioner before Mr. Justice Arkwright, were read into evidence and made part of the evidence against petitioner.

As a result of this procedure, due process has been violated. *Powell v. Alabama*, 53 S. Ct. 55, 64.

## POINT XII

**Respondent's sub-committee found petitioner guilty on inconsistent and conflicting findings of fact which establish innocence, not guilt.**

The charges made were that petitioner "submitted" false reports and bills to Miller (R. 44, f. 131).

Respondent's sub-committee found petitioner guilty of "issuing" them (R. 190, f. 570), but also found that:

> "* * * the medical bills and reports were prepared by the attorney and signed by the respondent * * *" (R. 193, f. 579).

It seems clear, therefore, *that the attorney prepared the subject reports and bills*, not petitioner herein.

It follows, therefore, that the charge that petitioner "submitted" such reports and bills to the same attorney is refuted by the sub-committee's own finding that it was the attorney who prepared them, and, therefore, they could not have been "submitted" to him by petitioner, as charged.

The ordinary meaning of words establishes that material is not "submitted" to the originator of the material.

The sub-committee's finding that the attorney "prepared" the reports also refutes its finding that it was petitioner who "issued" them.

## Conclusion

Part of petitioner's right to due process is the right to have his day in Court and to be heard. *Truax v. Corrigan*, 257 U. S. 312, 42 S. Ct. 124.

It has been well said that "his day in Court" means the right to be heard in the Court of last resort on constitutional questions. *Aero Design v. Oklahoma*, 154 F. Supp. 844, affirmed 77 S. Ct. 824.

It has also been well said by this Court that beneficent aims, however great or well directed, can never serve in lieu of constitutional power (*Carter v. Carter Coal Co.*, 298 U. S. 238, 291, 56 S. Ct. 855, 864) and the Seventh Circuit appropriately and succinctly stated that:

> "True it is that administrative convenience or even necessity cannot override the constitutional requirements of due process. Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U. S. 292, 304, 57 S. Ct. 724, 81 L. Ed. 1093."
>
> *Cella v. United States*, 208 F. 2d 783, 789, cert. den. 347 U. S. 1016, 74 S. Ct. 864.

**Wherefore, petitioner respectfully prays that the writ of certiorari issue so that the constitutional questions herein set forth may be heard in this Court of last resort, and prays that, on such hearing, this Court vacate and set aside respondent's order revoking petitioner's license to practice medicine in the State of New York.**

Respectfully submitted,

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*Attorney for Petitioner.*